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No. 85-1239

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

AMOCO PRODUCTION COMPANY, *et al.*,
*Petitioners,*

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States of Appeals for the Ninth Circuit**

## REPLY BRIEF OF AMOCO PRODUCTION COMPANY, *et al.*

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## REPLY BRIEF OF AMOCO PRODUCTION COMPANY, *et al.*

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## I. SECTION 810(a) OF ANILCA DOES NOT APPLY TO THE OCS.[1]

### A. The Subsistence Protection of Section 810(a) of ANILCA Is Narrower than the Title Extinction Effected by Section 4(b) of ANCSA.

The essence of respondents' argument that ANILCA applies to the OCS is summed up at page 21 of their brief:

> "Alaska Natives agreed to have Congress extinguish their aboriginal claims based on the un-

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[1] Petitioners will not respond to Question 1 of respondents' brief regarding their claims of aboriginal title or to any portion of the *amici* brief of North Slope Borough, *et al.*, which is devoted entirely to that question, since this Court did not grant respondents' cross-petition which raised this question, after petitioners demonstrated that it was not properly presented in this case and that it was without merit.

> derstanding that their subsistence uses on affected lands would be protected. If the Claims Settlement Act applies to the OCS, so does Title VIII."[2]

However, Title VIII of ANILCA protects subsistence only on "public lands." By contrast, the lands "affected" by ANCSA include not only federally owned "public lands," but also State and private lands. *See* 43 U.S.C. §§ 1603(b) & (c). Thus, the scope of ANILCA's subsistence protection is much narrower than ANCSA's title extinction.

This difference in the scope of the two statutes was consistently recognized in the legislative history of both statutes. Respondents point to various subsistence proposals that were rejected during the consideration of ANCSA, but argue that the ANCSA Conference Committee intended to insure, by oversight or other means, that Native subsistence rights would be protected in the future. (Resp. Br. 26 & n.26, 27). However, the subsistence measures that were then considered by Congress did not extend to the OCS.

For example, S. 35, 92d Cong., 1st Sess., § 21(a) (1971), would have directed the Secretary of the Interior "to classify . . . public lands surrounding any or all of the Native Villages and groups for which lands are withdrawn under Section 13 through 15 and under Section 23 as Subsistence Use Units." Such "withdrawn" "public lands" would have been onshore lands. *See, e.g.*, S. 35, § 13(b)(1) withdrawing "all public lands in each township, which encloses all or part of any Native Village . . . plus all public lands in each

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[2] Of course, Congress did not need the Natives' agreement to extinguish their aboriginal title claims. As respondents concede, "aboriginal title . . . [can] be extinguished at will by the sovereign holding the fee." (Resp. Br. 14). Moreover, as they have also conceded, ANCSA provided them with "generous" consideration for their extinguished titles and claims—more than 40 million acres of lands and nearly $1 billion in cash. (Resp. Opp. to Cert. Petns., p. 7).

township which is contiguous to or corners upon the townships in which such Native Villages are located. . . ."

The ANCSA Conference Committee's expectation that the Secretary would use his "existing withdrawal authority" to protect subsistence (Resp. Br. 26) must be read against such proposed ANCSA subsistence measures. Since Congress had considered directing the Secretary in ANCSA to withdraw onshore lands surrounding Native villages to protect subsistence, it was such "withdrawal authority" that the ANCSA Conference Committee obviously had in mind, not limitations on OCS leasing.

Respondents argue that "[w]hen Interior failed to heed this admonition [of the ANCSA Conference Committee], Congress was forced" to protect subsistence by enacting ANILCA. (Resp. Br. 6). But the subsistence protection which Congressman Udall then thought was necessary pertained only to subsistence uses on the so-called "D-2 lands" onshore Alaska. (*See* Amoco Br. 25-26). Secretary of the Interior Andrus also believed that ANCSA's implicit promise to the Natives regarding subsistence protection could be similarly satisfied. (*Id.* at 26). The views of a member of Congress in the "thick of the fray" regarding ANCSA[3] and of the official principally charged with implementing that statute[4] constitute very persuasive evidence that ANCSA's extinguishment of title did not entail a *quid pro quo* dictating subsistence protection on the OCS.

Moreover, the proposed modification of the Udall/Andrus position advocated by the Alaska Federation of Natives (AFN) and eventually accepted by the Congress was not designed to make ANILCA's subsistence protection coextensive with ANCSA's title extinguishment. Although respondents baldly assert that the AFN took the position that Congress should "apply the subsistence title [of AN-

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[3] *Heckler* v. *Turner*, 470 U.S. 184, 209 (1985).

[4] *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

ILCA] to all lands to which [ANCSA] had extinguished title" (Resp. Br. 28), they are forced to admit that the AFN's proposal was limited to extending subsistence protection "to all Native subsistence uses on all Federal public lands" (*id.*). Neither the AFN nor anyone else ever made the linkage which plaintiffs now discern between the scope of ANCSA's extinction of title and the extension of ANILCA's subsistence protection.[5]

### B. The OCS Is Not "Situated in Alaska" Within the Meaning of ANILCA.

Respondents do not argue that the OCS is "situated in Alaska" within the meaning of the Alaska Statehood Act, the OCS Lands Act, or the Submerged Lands Act. (*See* Amoco Br. 13-14). Instead, respondents stand entirely upon the Ninth Circuit's interpretation of "in Alaska" in Section 4(b) of ANCSA as extending to the OCS. They contend that, given this interpretation of ANCSA, the OCS must similarly be "situated in Alaska" for purposes of ANILCA. In addition to failing to come to grips with petitioners' showing (Amoco Br. 14-15) that the Ninth Circuit need not have relied on Section 4(b) of ANCSA to reject respondents' claims of aboriginal title and with our showing in Part I.A. above that there is no basis for construing Section 4(b) of ANCSA and Section 810 of ANILCA *in*

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[5] Respondents argue that the AFN's restriction of subsistence protection to public lands located within the exterior boundaries of the 12 regional corporations could have contemplated the extension of Section 810 of ANILCA to the OCS since, according to respondents, the boundaries of the regional corporations were understood to include the OCS. (Resp. Br. 29 n.28). The document which they cite for this proposition (Pl. Ex. I) is a crudely drawn map which projects some corporate boundary lines to include offshore islands. ANCSA, 43 U.S.C. § 1606(a), clearly contemplates that the boundaries of the 12 regional corporations established by the statute would all lie within the State of Alaska: "[T]he State of Alaska shall be divided . . . into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests."

*pari materia*, there is another fatal flaw in respondents' argument.

In Section 4(b) of ANCSA the term "in Alaska" was defined as "including submerged land underneath all water areas, both inland and offshore." The term "include" or "including" is sometimes used in a statutory context "to add to the general class a species which does not naturally belong to it." *Morris Friedman & Co.* v. *United States*, 351 F. Supp. 611, 613 (Cust. Ct. 1972). *See also* Black's Law Dictionary 687 (5th ed. 1979). In this sense, the term "including" is a short-hand expression for the phrase "for the purposes of this statute the term [x] shall include [y]."[6] Congress' addition of the phrase "including submerged land . . . offshore" in Section 4(b), therefore, does not imply that the phrase "in Alaska," when not specifically modified to apply to the OCS, comprehends that region. Thus, when Congress in ANILCA used only the phrase "situated in Alaska," it gave no indication that the phrase should extend to the OCS.

Respondents' argument is not advanced by their reference to a reply memorandum filed in the *Inupiat Community* case (Resp. Br. 32-33), where some of the petitioners argued that it was "perfectly natural" for Congress to include the OCS within the phrase "in Alaska" in Section 4(b) of ANCSA. The same memorandum noted that Congress made clear in ANCSA that it intended to

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[6] That Congress used the term "including" in Section 4(b) to broaden its scope is strongly suggested by the last clause of that provision. It "includ[es] any aboriginal hunting or fishing rights that may exist" among the "aboriginal titles . . . and claims of aboriginal title" extinguished by Section 4(b). Hunting and fishing rights are broader than "aboriginal titles." *See* F. Cohen, *Handbook of Federal Indian Law* 442 (1982 ed.) ("[t]he existence of aboriginal hunting and fishing rights . . . does not necessarily turn upon the existence of original title to lands"); *id.* at 450-51 (discussing off-reservation hunting and fishing rights). Thus, when Congress "includ[ed]" such rights in the scope of Section 4(b), it was extending the scope of the statute.

effect a "fair and just settlement of *all claims by Natives and Native groups of Alaska*, based on aboriginal land claims." (Reply Memo. p. 104, quoting 43 U.S.C. § 1601(a)). Where Congress made clear its intention to do away with all such claims, it would be "perfectly natural" to include the OCS within the phrase "in Alaska," particularly when Congress went on explicitly to "includ[e] submerged land . . . offshore" within the scope of Section 4(b). It was not "perfectly natural" for the Ninth Circuit to construe Section 810(a) of ANILCA—which pertains only to "public lands" and is silent as to the OCS—as extending to that region.[7]

**C. The United States Does Not Assert Title to the OCS.**

Neither respondents nor their supporting *amici* come to grips with petitioners' several arguments that the United States has not asserted "title" to the OCS. Instead, they advance three patently erroneous arguments in support of their position.

First, respondents and *amici* State of Alaska make the irrelevant point that the term "lands" as used in ANILCA is broadly defined to include "lands, waters, *and interests therein*." (Resp. Br. 23). However, Section 810(a) applies only to those "lands" as to which the United States asserts "title." 16 U.S.C. § 3102(2). The United States has never asserted title to any "lands, waters, [or] interests" on the OCS (Amoco Br. 15-19). Instead, as to "interests" such

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[7] The State of Alaska cites *United States* v. *Ptasynski*, 462 U.S. 74, 77-78 (1983), for the proposition that "exempt Alaskan oil" under the windfall profit tax, 26 U.S.C. § 4991(b)(3), includes oil produced on the Alaskan OCS. However, the statute defines "exempt Alaskan oil" generally as oil produced north of the Arctic Circle, and the Court held that the statutory description of the oil as "Alaskan" is "not entirely accurate," in part because "oil produced in certain offshore . . . waters . . . beyond the limits of any State—is included within the exemption." *See generally* 26 U.S.C. § 4994(e). This suggests that if the statute had defined "exempt Alaskan oil" as oil produced "in Alaska" the Court would have held that it did not apply to the OCS.

as fishing or mineral rights it has, in the words of the recent House report (*id.* at 16), asserted only "resources-related claims of jurisdiction. . . ." H.R. Rep. No. 300, 99th Cong., 1st Sess. 591-92 (1985).

Second, Alaska errs in arguing that the United States must assert title to OCS oil and gas, since it conveys leasehold rights that allow exploitation of these minerals. (Alaska Br. 11-12). However, the grant of a lease to allow a person to explore for oil and gas does not imply that the lessor has "title" to the oil and gas itself. *See Ohio Oil Co.* v. *Indiana*, 177 U.S. 190 (1900).[8] Moreover, the exclusive rights enjoyed by the United States to exploit the resources of the OCS do not imply that it has title to them. *See United States* v. *Ray*, 423 F.2d 16 (5th Cir. 1970).[9]

Third, respondents argue that Section 1001 of ANILCA specifically exempts the OCS from the scope of the study contemplated by that section and that OCS lands are specifically excluded from two other federal statutes which generally apply to federally owned lands. (Resp. Br. 24-25). Petitioners have previously addressed the Section 1001 argument. (Amoco Br. 13; Hodel Br. 32 n.20). As is there

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[8] In *Ohio Oil*, this Court, interpreting State law, held that the owner of a surface estate has no "title" to the oil or gas underlying the surface "until the substances are actually reduced by him to possession." A number of important oil-producing States continue to follow this theory, 1 H. Williams & C. Meyers, *Oil and Gas Law* § 203.1, at 33 (1985), while others embrace only a "qualified" ownership theory regarding title to unproduced oil and gas, *id.* § 203.2 at 39-44. Only a minority of oil-producing States recognize "title" to unproduced oil and gas. *Id.* § 203.3 at 44-50.

[9] In *Ray*, the United States carefully avoided an assertion of title to a submerged reef on the OCS, 423 F.2d at 19 n.3, 21-22, while simultaneously seeking an injunction against its use by an unauthorized party. The court granted the injunction, holding that "neither ownership nor possession is . . . a necessary requisite for the granting of injunctive relief." 423 F.2d at 22.

revealed, Congress's exclusion of the OCS from the Section 1001 study seems to have been prompted by an abundance of caution. The same observation can be made about the other two statutes relied upon by respondents. Congress' caution in this regard should not be converted into a *sub silentio* assertion of title to the OCS for purposes of Section 810 of ANILCA.

From the time of the Truman Proclamation to the present, Congress has often directly confronted the OCS title issue and has never asserted United States title to any lands, waters, or interests in land on the OCS. Nothing in ANILCA suggests that Congress silently abandoned this posture and asserted title to the OCS so as to apply ANILCA's subsistence protection there. To the contrary, Congress' use of the term "public lands" to define the scope of ANILCA and its prior use of that same term in both the Statehood Act and ANCSA—ANILCA's direct predecessors—in contexts which could not possibly apply to the OCS (Amoco Br. 22-24), clearly demonstrate that Congress did not intend in ANILCA to assert title to the OCS.[10]

**D. ANILCA Is Not a General Subsistence-Protection Statute.**

Contrary to Alaska's argument (Alaska Br. 17-19), Section 810 is not a general subsistence-protection statute. It applies only when the United States disposes or permits the use of lands to which it holds title that are situated in Alaska. Therefore, the Act does not apply to actions of the federal government that might take place on lands or waters within three miles of the Alaska coast, since these lands are owned by the State pursuant to the Submerged Lands Act. Similarly, it does not apply to such actions on Native-owned lands, where presumably the bulk

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[10] It is noteworthy that at no point in their briefs do respondents or Alaska assert that the OCS is part of the "public lands" under the Statehood Act or ANCSA.

of subsistence activities occur, or on State or privately owned onshore lands that are used for subsistence. Thus, the issue here is not, as Alaska argues (*id.* at 18), whether Congress intended to "abandon its concern for subsistence at the three mile line," since ANILCA does not apply to the territorial sea nor to adjacent onshore lands where most subsistence occurs.

There are, of course, other federal statutes that do protect subsistence within State waters, on Native, State or private lands, and on the OCS from impacts of federal activities. Under the National Environmental Policy Act, 42 U.S.C. § 4321 (NEPA), federal agencies must analyze their actions to assess subsistence impacts. Indeed, in this case the district court concluded that analysis done under NEPA evaluated the effects of leasing on subsistence and alternatives that would reduce or eliminate the impacts of OCS leasing. (Amoco Br. 7). Moreover, the Endangered Species Act, 16 U.S.C. § 1531 (ESA), protects important subsistence species, such as the bowhead and gray whale, as does the Marine Mammal Protection Act, 16 U.S.C. §1361. It is these statutes, all of which were complied with by the Department of the Interior in this case, not ANILCA, that afford broad-based protection of subsistence.

## II. THE RESTRICTIONS OF SECTION 810(a)(1)-(3) DO NOT APPLY TO OCS LEASE SALES THAT ARE UNLIKELY TO RESTRICT SUBSISTENCE.

Respondents attempt to avoid petitioners' showing that the lower court misapplied Section 810(a)(1)-(3) in requiring full leasing-stage compliance with the statute by arguing that "[t]he court of appeals . . . ignored the post-sale evaluations." (Resp. Br. 35). However, *Village of Gambell* v. *Clark*, 746 F.2d 572, 582 (9th Cir. 1984) (Amoco Petn. A21) (*Gambell I*), itself recognized that the preparation of a post-sale ANILCA evaluation might sustain a sale when it remanded to the district court the question whether "the proper remedy is to maintain the status quo unless and

until the Secretary complies with section 810. . . ."[11] Moreover, in *Village of Gambell* v. *Hodel*, 774 F.2d 1414, 1421-22 (9th Cir. 1985) (Amoco Petn. A34) (*Gambell II*), the court noted with apparent approval the Secretary's preparation of a post-sale ANILCA evaluation for Sale No. 57 and relied on its conclusion that the development and production stage of the sale "may significantly restrict subsistence uses in certain areas" in holding that the Secretary must comply with the requirements of Section 810(a)(1)-(3) prior to proceeding with further activities in the Sale No. 57 area. Respondents cannot, therefore, defend the decision below on the ground that it properly "ignored the post-sale evaluations."[12]

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[11] This is precisely the course of action which the Ninth Circuit followed in *California* v. *Watt*, 683 F.2d 1253, 1256 (9th Cir. 1982), *rev'd on other grounds*, 464 U.S. 312 (1984), when it permitted Interior to prepare a post-sale consistency determination under the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451.

[12] The decisions of this Court cited by petitioners in support of their argument that the courts cannot consider *post hoc* analyses of administrative actions are distinguishable. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), and *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), involved the quite different issue of the use of arguments made by counsel to provide a *post hoc* explanation of agency action. *Camp* v. *Pitts*, 411 U.S. 138 (1973), and *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), held that an agency's action must be reviewed on the basis of the administrative record; neither held that the courts can consider only administrative documents prepared prior to the challenged decision. To the contrary, *Overton Park* specifically suggested that the Secretary of Transportation could prepare *post hoc* formal findings to provide an explanation of his action. 401 U.S. at 420.

A court exercising judicial review of administrative action "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939). Thus, a court which discovers a flaw in an agency's action is not required immediately to set it aside, if such relief would have adverse consequences upon the government or third parties. Instead, the court can identify the agency's error and remand the

### A. Section 810's Specific Reference to "Leases" Does Not Sustain the Decision Below.

Respondents' and the State of Alaska's emphasis that Section 810(a) of ANILCA specifically refers to the term "lease" does not rebut our argument. The term "lease," like all of the other dispositions of land referred to in Section 810(a), appears in both of the "tiers" of the section. The first "tier" of Section 810(a) requires Interior to evaluate the impacts of the proposed disposition, the availability of other lands, and other alternatives, whenever the Department proposes to "lease" or otherwise dispose of land subject to Section 810(a). Petitioners have never denied that the leasing of all lands subject to the section must be evaluated pursuant to these first-tier requirements.

The second-tier requirements of Section 810(a)—(1) notice, (2) hearings, and (3) specified findings—are applicable to "leases" or other dispositions only if they "would significantly restrict subsistence uses." Clearly Congress did not intend that every "lease" or other disposition referred to in the second tier of Section 810(a) would be subject to those requirements. Thus, the issue here is not whether leasing is subject to Section 810(a)—clearly it is subject to the first-tier requirements—but instead is whether the specific leasing proposed by Interior in this case has the type of effect on subsistence which requires compliance with the second-tier requirements.[13]

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proceedings to allow the agency to cure its error through further proceedings. *See, e.g., Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 813 (9th Cir. 1980); *Rodway* v. *United States Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975).

[13] Contrary to respondents' assertions (Resp. Br. 37), petitioners do not take the position that the issuance of a lease can never trigger the second-tier requirements of Section 810(a)(1)-(3). Certainly, those requirements would attach where a federal agency leases land and relinquishes control over the use of the property, if that action gives

**B. Section 810(a)(1)-(3) of ANILCA Should Not Be Interpreted *in Pari Materia* with NEPA.**

Respondents argue that, because NEPA requires the preparation of an impact statement when substantial questions are raised concerning a project's impacts on the environment, there should be full-fledged compliance with Section 810(a)(1)-(3) of ANILCA whenever questions are raised concerning possible impacts upon subsistence. This argument ignores fundamental differences between Section 810(a)(1)-(3) and NEPA.

As noted, petitioners do not dispute that all leasing of those lands subject to ANILCA must be evaluated pursuant to the requirements of the first-tier of Section 810(a). Like NEPA, that evaluation entails review of the impacts of the proposed action and consideration of relevant alternatives. However, the second tier of Section 810(a)—particularly the determinations required by Section 810(a)(3) that the project will use the minimal amount of lands necessary and will not proceed until adequate mitigation measures are adopted—goes beyond what Alaska properly recognizes are the "essentially procedural [requirements of NEPA]." (Alaska Br. 23). Thus, Congress designed the first tier of Section 810(a), like NEPA, to apply to all proposed dispositions of public lands, but limited the scope of the second-tier requirements of the section to only those dispositions that "would significantly restrict subsistence."[14]

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rise to a likelihood that subsequent private action on the leased property would significantly restrict subsistence. It is even possible that those requirements would arise in a multi-stage leasing setting, if it is established that leasing is likely to be followed by significant subsistence restrictions at later stages. In this case, however, the Interior Department properly found that neither leasing nor exploration would significantly restrict subsistence and that there is only a 13-14% probability of reaching the production stage where such restrictions may occur.

[14] Alaska argues (Alaska Br. 28) that "[w]here the objective of the

### C. The Purposes of Section 810(a) Do Not Require Leasing-Stage Compliance with Its Second-Tier Requirements when the Secretary Retains Authority To Regulate All Subsequent Stages.

Respondents concede that "the Secretary retains broad control over exploration, development, and production activities under the OCSLA." (Resp. Br. 39). They nonetheless contend that "leasing constitutes an irrevocable commitment of resources" and a "critical" stage because money then changes hands, tracts are leased, and stipulations are adopted bearing upon later operations. (*Id.*). Accordingly, respondents argue that the purposes of Section 810(a) can be satisfied only if Interior is forced to comply, in full, with all of the requirements of that section prior to authorizing the leasing stage of an OCS project.

This Court considered such arguments in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). There, too, it was argued as the premise for CZMA compliance at the leasing stage

> "that a lease sale is a crucial step. Large sums of money change hands, and the sale may therefore generate momentum that makes eventual exploration, development, and production inevitable." 464 U.S. at 342.

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statute is to provide good information . . . courts have required that the project be examined in its entirety rather than piecemeal," and cites seven court of appeals opinions, three of which pertain in part to analysis of projects under the ESA. The ESA, like the second-tier requirements of ANILCA, imposes substantive restrictions upon leasing. The three ESA decisions cited by Alaska—*North Slope Borough* v. *Andrus*, 642 F.2d 589, 607-10 (D.C. Cir. 1980); *Conservation Law Found.* v. *Andrus*, 623 F.2d 712, 715 (1st Cir. 1979); and *Village of False Pass* v. *Clark*, 733 F.2d 605, 610-12 (9th Cir. 1984)—all recognized that Interior is not required at the leasing stage of an OCS project to impose ESA-motivated restrictions on leasing, but instead has sufficient regulatory authority to impose such limitations at those later stages which give rise to a threat of jeopardy to an endangered species.

However, this Court noted the other side of that argument—

> "that . . . review at the lease sale stage is at best inefficient and at worst impossible: Leases are sold before it is certain if, where, or how exploration will actually occur." *Id.*

The Court concluded that Congress had decided which side of the argument should prevail by structuring OCS projects to require CZMA review at exploration and production and by limiting CZMA review of federal activities to those which "directly affect[]" the coastal zone. Thus, notwithstanding claims that leasing is a "crucial step," the Court held that it was not subject to the CZMA.

For the same reasons, OCS leasing is not subject to the second tier of ANILCA. Just as the CZMA provides for subsequent review at later stages of an OCS project which might give rise to effects within the purview of the statute, Section 810(a) of ANILCA clearly applies to all later stages of multi-stage projects. Accordingly, it cannot be held that leasing "would significantly restrict subsistence" merely because of the presently remote prospect that subsistence restrictions may occur at a later stage. Assuming *arguendo* that ANILCA applies to OCS sales, its purposes can be fully realized by applying the second-tier requirements of Section 810(a) prior to any stage that "would significantly restrict subsistence."

## III. THE NINTH CIRCUIT'S RULING IN *GAMBELL I* SHOULD NOT BE APPLIED RETROACTIVELY.

Respondents' only answer to petitioners' showing that *Gambell I* should not be applied retroactively under this Court's decisions in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), *City of Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978), and other cases is to point out that a legal challenge to Sale No. 57 was filed prior to the conduct of either that sale or of Sale

No. 83. However, the *Huson* test for determining the retroactive application of a new interpretation of a statute does not turn upon whether a complaint was filed prior to a challenged transaction. While the third prong of that test—whether a retroactive application of a new decision would involve inequities—would seem to allow consideration of the timing of a complaint, neither *Huson* nor any other decision of this Court suggests that the prior filing of a complaint *per se* tips the equities in favor of plaintiffs.[15]

Sale Nos. 57 and 83 were not conducted until after a district court had rejected respondents' theory that ANILCA applies to the OCS and a motions panel of the Ninth Circuit had permitted the consummation of Sale No. 57. In these circumstances, the equities lie with the industry petitioners who were forced either to cast their bids at the two sales or to lose for all time their opportunity to do so.[16]

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[15] Indeed, in *Manhart* the Court refused to disturb any part of the pension plan which was attacked by plaintiffs, including the administration of those monies in the plan accumulated since the filing of the plaintiffs' complaint.

[16] Respondents' reliance upon their Sale No. 57 complaint, whatever its relevance to the equities as to that transaction, does not justify a retroactive application of *Gambell I* to Sale No. 83. That sale proceeded without any litigation challenge, so that respondents' *lis pendis* argument (Resp. Br. 50) does not apply to it. Moreover, the Sale No. 57 complaint applied only to those portions of the OCS that are used by Native Alaskans and thus are subject to their claims of aboriginal title. Respondents have never contended that they use any portion of the remote Navarin Basin affected by Sale No. 83. Moreover, in their brief in this Court they have conceded that Interior may continue to lease "those substantial [OCS] areas not historically used by Alaska's Native peoples." (Resp. Br. 21). Thus, when Sale No. 83 took place, there was no reason to believe that respondents or anyone else would assert that ANILCA applies to the Sale No. 83 area.

## IV. THE NINTH CIRCUIT'S *PER SE* INJUNCTIVE RELIEF RULE IS INCONSISTENT WITH THE COURT'S DECISION IN *WEINBERGER* v. *ROMERO-BARCELO.*

Both of the petitions in this case sought this Court's review of *Gambell II's* articulation of the "Ninth Circuit rule" that a "substantive [*sic*? substantial] procedural violation" of an environmental statute *per se* justifies the grant of an injunction, except in "rare" circumstances where the injunction would harm the environment or interfere with a very limited class of long-term contracts. In briefing this question, petitioners cited this Court's recognition in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982), that Congress can restrict courts' equitable discretion to deny injunctive relief, but pointed out that the Ninth Circuit had not analyzed ANILCA to determine whether it did so. (Amoco Br. 43-44). Instead, petitioners demonstrated that the Ninth Circuit had attempted to distinguish *Weinberger* because it allegedly presented only a narrow question regarding the Clean Water Act. (*Id.* at 44).

Respondents do not even attempt to defend this distinction of *Weinberger*.[17] Instead, they contend that "[w]hether the court of appeals relied on a *per se* rule in this case is subject to question" (Resp. Br. 41), and then go on to argue that either the application of "traditional

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[17] Respondents do argue that petitioners conceded in *Gambell I* that an injunction should issue pending Interior's compliance with ANILCA (Resp. Br. 40-41), thus suggesting that they are now estopped from challenging the Ninth Circuit's *Gambell II* injunction. However, the very documents attached by respondents to their brief show that petitioners qualified their argument in *Gambell I* by citing *Weinberger* and making clear that an injunction would be appropriate only "if irreparable harm is shown." (Resp. Br. 7a; *see also id.* at 6a).

equitable principles" or an analysis of ANILCA justifies the court of appeals' reversal of the district court.[18]

In arguing this latter point, respondents admit that

> "[w]hether a given statute divests the courts of equitable discretion depends upon its language and purposes." (Resp. Br. 45).

They concede that this case requires a "particularized inquiry into [ANILCA's] language and purposes." *Id.* The *amici* supporting respondents go even farther. They admit that "[i]n most instances, Congress does not foreclose . . . discretion" (States Br. 9) and stress that an appropriate assessment of the propriety of the Ninth Circuit's reversal of the district court here requires a close reading of the terms and legislative history of ANILCA. (*Id.* at 13-17; *see also* NRDC Br. 6-8).

It is, therefore, quite apparent that there is no division between the parties as to the injunctive-relief question presented in the petitions in this case. Petitioners demonstrated in their opening briefs that the Ninth Circuit's *per se* rule was hopelessly at odds with *Weinberger*'s teaching that the propriety of injunctive relief depends upon an inquiry into the underlying statute and facts of the case, and respondents no longer contest this point.

This Court, therefore, would be justified in reversing the Ninth Circuit's decision as being improperly based upon its *per se* rule and declaring that the "Ninth Circuit rule" reiterated in *Gambell II* is inconsistent with *Weinberger*.

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[18] Respondents' argument that "traditional equitable principles" sustain the decision below is premised upon their willingness to disregard the massive financial losses that industry petitioners would have suffered by virtue of an injunction because they were made after the court of appeals' decision in *Gambell I*. (Resp. Br. 42). Respondents fail to note that $60 million of these commitments concerned the Sale No. 83 region, and were incurred prior to the filing of any complaint regarding that sale. (Amoco Petn. A51-52, dissenting opinion of Judge Dimmick).

Such an approach would avoid the "particularized inquiry" that would otherwise be necessary to determine whether ANILCA, as applied to the facts of this case, justifies the preliminary injunction mandated by the lower court.[19] Should the Court nonetheless desire to go beyond a declaration of the invalidity of the "Ninth Circuit rule," it should reject respondents' and *amici*'s arguments that a particularized inquiry into the applicable law and facts supports the Ninth Circuit's decision in *Gambell II*.

Respondents and *amici* mistakenly attempt to distinguish *Weinberger* and to rely on *TVA* v. *Hill*, 437 U.S. 153 (1978), on the ground that Section 810(a) of ANILCA—like the ESA in *Hill*—imposes a "nondiscretionary duty" on the Secretary to analyze effects on subsistence. (NRDC Br. 6). However, the duties imposed by Section 810(a) cannot be distinguished from those in *Weinberger*, since the Clean Water Act, 33 U.S.C. §§ 1311(a), 1342(a), also imposes non-discretionary duties; it absolutely prohibits the release of substances into navigable waters in the absence of a permit issued by the Environmental Protection Agency. Nonetheless, after the district court determined that the discharges at issue in *Weinberger* posed no threat of irreparable harm to the waters in question,

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[19] This case is an especially inappropriate one for this Court to engage in the "particularized inquiry" necessary to determine whether an injunction is or is not appropriate. In the first place, there are two different transactions before the Court which raise different issues under Section 810(a) of ANILCA. Sale No. 57 involves the question of plaintiffs' entitlement to injunctive relief because the second-tier requirements of the statute have not been complied with after Interior found that there may be significant subsistence restrictions at the production stage. By contrast, Sale No. 83 involves an alleged violation of the first-tier requirements of ANILCA where the Department found, when complying with NEPA, that no stage of the sale is likely to cause significant subsistence restrictions. The difficulties of applying the statute to these two transactions are magnified by the fact that there are important questions before the Court regarding the interpretation of ANILCA. *See* part II, *supra*.

456 U.S. at 310, this Court ruled that the violation of the Clean Water Act there established did not mandate issuance of an injunction.

Moreover, there is a dispositive distinction that separates both this case and *Weinberger* from *Hill*. In *Hill*, it was conceded that denial of the injunction sought by plaintiffs would immediately lead to the very consequences prohibited by the statute—the destruction of an endangered species and its habitat. 437 U.S. at 173-74. Had this Court refused to uphold the injunction afforded plaintiffs below, it would have, in effect, nullified the ESA as invoked by them; the choice faced by the Court in *Hill* was either to grant the injunction against completion of the dam or refuse to provide plaintiffs with any relief for the statutory violation that they had established.

In both *Weinberger* and this case, by contrast, grant of the precise relief sought by plaintiffs was not necessary to assure that a statutory violation would not go unremedied. Here, the district court merely denied a preliminary injunction against imminent exploration; [20] it has not ruled that respondents will be denied alternative remedies after a hearing on the merits if they establish a violation of ANILCA. Accordingly, the district court's denial of the injunction in this case falls well within the traditional equitable discretion possessed by courts in designing remedies. Unlike *Hill*, the denial of the injunction sought by

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[20] Respondents refer to *dicta* in the court of appeals opinion regarding the alleged threats posed by exploration to Native subsistence. (Resp. Br. 44). However, Interior determined that exploration itself would not lead to significant subsistence restrictions within the meaning of ANILCA, and the district court independently found that "exploration will not significantly restrict subsistence resources." (Amoco Petn. A63). Since the court of appeals did not declare that finding to be either clearly erroneous or an abuse of discretion, its reversal of the district court's denial of the injunction cannot be sustained by its speculation as to the potential impacts of exploration on subsistence. *See* Amoco Br. 41-42 & n.46.

respondents here does not constitute a refusal by the courts to enforce the statute.

## CONCLUSION

For the reasons stated above and in petitioners' opening brief, the decision below should be reversed.

Respectfully submitted,

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